**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| EDWARD D. JOHNSON,<br><br>Appellant,<br><br>v.<br><br>METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY, a Rhode Island Insurance Company,<br><br>Respondent. | ) | NO. 63198-5-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: February 16, 2010 |

Leach, J. — Edward D. Johnson appeals a summary judgment dismissing his claims for breach of insurance contract, declaratory judgment, and damages. The terms in Metropolitan Property and Casualty Insurance Company's (MetLife) policy concerning entitlement to underinsured motorist coverage are clear and unambiguous. These terms do not violate Washington statutes or public policies. Because Johnson was not listed as a named insured on MetLife's policy and did not otherwise qualify, he is not entitled to underinsured motorist coverage under the policy. We affirm.

FACTS

Johnson and Carol S. Collins were engaged to marry, had a child, and

lived together. She owned a Honda, and they jointly owned a Ford van. At Johnson's request, Collins added him to a MetLife auto insurance policy, which she previously purchased at a discount through her employer. The couple believed that this would give Johnson the same coverage as Collins but at a significant costs savings: it was cheaper than paying a full premium on separate policies, and Johnson presumably sought to benefit from Collins's employer-based discount.

The policy declarations pages listed Collins as the "named insured" and both Collins and Johnson as "household drivers." In January 2006, Johnson rented a car for a few days but elected not to purchase personal accident insurance or third party bodily injury and property insurance. He was injured in an auto accident while driving this rental car. He filed claims under the Personal Injury Protection (PIP) and Underinsured Motorist (UIM) coverage of Collins's policy. MetLife paid the PIP claim but denied the UIM claim explaining, "[Johnson is] not a named insured and he is not married to Ms. Collins, so he does not qualify as 'you or a relative.' He would only be covered for underinsured motorist bodily injury coverage if he was occupying a covered automobile at the time of the injury." The rental vehicle was not a covered automobile.

Johnson filed suit against MetLife for breach of contract, declaratory judgment, and damages, alleging that MetLife had wrongfully denied him UIM

coverage, had waived or was estopped from denying coverage, and that MetLife's policy interpretation was contrary to RCW 48.22.030 and therefore violated public policy. MetLife counterclaimed for a declaration that its policy did not provide Johnson with UIM coverage for the rental car accident. The parties filed cross motions for summary judgment. The trial court granted MetLife's motion. Johnson appeals.

STANDARD OF REVIEW

This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court.[1] Summary judgment is proper if the court, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, finds no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[2]

Interpretation of an insurance policy is a question of law reviewed de novo.[3] Insurance policies are contracts, and rules of contract interpretation apply.[4] Accordingly, Washington courts review the policy as a whole to give it a "'fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'"[5] Courts enforce clear and

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[1] Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005).

[2] CR 56(c); Torgerson v. N. Pac. Ins. Co., 109 Wn. App. 131, 136, 34 P.3d 830 (2001).

[3] Hall v. State Farm Mut. Auto. Ins. Co., 133 Wn. App. 394, 399, 135 P.3d 941 (2006).

[4] Hall, 133 Wn. App. at 399 (citing Quadrant, 154 Wn.2d at 171).

[5] Quadrant, 154 Wn.2d at 171 (internal quotation marks omitted) (quoting

unambiguous policy language as written and will not create ambiguity where none exists.[6]

A term, phrase, or clause is ambiguous when, on its face, it is susceptible to different but reasonable interpretations.[7] No ambiguity exists simply because the parties favor competing interpretations. If policy language is ambiguous, the court may look to extrinsic evidence of the parties' mutual intent.[8] Any remaining ambiguity is resolved in favor of the insured.[9] But unilateral expectations of the insured do not override the contract's plain language.[10]

ANALYSIS

Johnson asserts that since he was a "household driver," he qualified for coverage as a "named insured." He also contends that MetLife's policy violates public policies codified in RCW 48.22.030, which requires insurers provide UIM coverage, and RCW 48.30.300, which prohibits discrimination on the basis of marital status. Finally, Johnson seeks attorney fees and costs.

*Named Insured*

Washington courts utilize a two-step inquiry to determine whether insurance coverage exists. First, the insured must show that the loss claimed is

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Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 666, 15 P.3d 115 (2000)).

[6] Quadrant, 154 Wn.2d at 171.
[7] Quadrant, 154 Wn.2d at 171.
[8] Quadrant, 154 Wn.2d at 171-72.
[9] Quadrant, 154 Wn.2d at 172.
[10] Hall, 133 Wn. App. at 399.

covered by the policy. Then, the insurer, seeking to avoid coverage, must point to specific policy language excluding the insured's loss.[11]

MetLife's policy provides UIM coverage for the following persons:

> 1. [Y]ou or a relative, caused by an accident arising out of the ownership, maintenance, or use of an underinsured motor vehicle, which you or a relative are legally entitled to collect from the owner or driver of an underinsured motor vehicle; or
>
> 2. [A]ny other person, caused by an accident while occupying a covered automobile, who is legally entitled to collect from the owner or driver of an underinsured motor vehicle.
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> We will also pay damages to any person for damages that person is entitled to recover because of bodily injury sustained by anyone described in 1. or 2. above.

Accordingly, the policy insures those qualifying as "you," a "relative," or those occupying a "covered automobile."

Only the meaning of "you" is at issue in this case.[12] The policy defined "you" as "the person(s) named in the Declarations of this policy as named insured and the spouse of such person or persons if a resident of the same household." On the first declarations page only Collins's name appeared under the heading, "Named Insured."

Johnson first argues, without citing any legal authority, that he was entitled to UIM coverage by virtue of being an insured party, i.e., "household

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[11] Wright v. Safeco Ins. Co. of Am., 124 Wn. App. 263, 271, 109 P.3d 1 (2004) (citing McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 731, 837 P.2d 1000 (1992)).

[12] Johnson does not assert that he was a "relative" or was driving a "covered automobile" at the time of the accident.

driver," listed on the second page of declarations. He writes in his brief:

> [Johnson] was named as a person who was added to the policy, a household driver, a person insured by the policy, a person who was covered by the policy. If he was not named as an excluded person, he must be named as an insured person. He must be a named insured.

Case law, however, does not support this sweeping proposition.

Courts are not at liberty, under the guise of interpretation, to rewrite contracts that parties have deliberately made themselves.[13] Clear and unambiguous language is enforced as written. The definition of "you" is clear and unambiguous. "You" includes "named insureds" and resident spouses of "named insureds." The only "named insured" identified within the policy was Collins. Only Collins or her resident spouse meets the definition of "you." Johnson, in contrast, was a "household driver."

Supreme Court precedent supports this distinction between "named insured" and "household driver." In Holthe v. Iskowtiz,[14] an insurance policy named Bessie Uhlman as the "named insured" and her daughter, Betty Uhlman, as an additional "insured" party. The issue was whether Betty, a resident of Bessie's household who was "to be covered hereunder as insured," was also a "named insured."[15] The court answered in the negative. It quoted 7 John Allen Appleman, Appleman Insurance Law and Practice § 4354, at 130, observing that

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[13] Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130, 137, 26 P.3d 910 (2001).

[14] 31 Wn.2d 533, 197 P.2d 999 (1948)

[15] Holthe, 31 Wn.2d at 537-39.

"'[w]henever the term "named insured" is employed, it refers only to the person specifically designated upon the face of the contract.'"[16] Thus, "while . . . the word 'insured,' without further qualification, should apply to any person entitled to protection under the policy, including a 'named insured,' the latter term could apply only to the person designated in the policy as the named insured."[17]

Johnson next claims that a statutory definition of "named insured" is incorporated into the policy. RCW 48.22.005(9) defines "named insured" as "the individual named in the declarations of the policy." Relying on this definition, Johnson asserts that since he was named in the declarations (as a "household driver"), he is included within the policy definition of "you."[18]

This argument is without merit. RCW 48.22.005 also provides that "the definitions in this section apply throughout this chapter." Contrary to Johnson's suggestion, by its own terms this statute does not purport to replace express definitions contained in an insurance policy contract with the definitions contained in the statute. Johnson cites to no authority for the proposition that it does.

Johnson also argues that Collins's intent to purchase equal coverage for herself and Johnson controls the meaning of the policy terms. Though

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[16] Holthe, 31 Wn.2d at 539 (emphasis added).

[17] Holthe, 31 Wn.2d at 543.

[18] The complete definition of "named insured" contained in RCW 48.22.005(9) is "the individual named in the declarations of the policy and includes his or her spouse if a resident of the same household."

ambiguous policy language may be resolved by looking to extrinsic evidence of shared intent,[19] expectations unilaterally held do not trump a contract's plain, clear language.[20] Thus, evidence of unilateral intent may not be used to establish an ambiguity.[21] Because the contract language in this case is clear and unambiguous, we do not consider Collins's intent.

Johnson makes two additional claims of ambiguity, neither of which is persuasive. First, Johnson points to MetLife's denial letter. This letter explained that Johnson was a "listed" driver rather than a "named insured." Claiming "listed" and "named" are synonyms, Johnson asserts that he should be treated as a "named insured." We disagree. The scope of UIM coverage is determined according to the language of the insurance policy, not the language appearing in a letter denying coverage. Johnson cites to no authority to the contrary. Moreover, the insurance policy does not use the word "listed." Thus, the language in the denial letter is not evidence of the policy's meaning.

The second claimed ambiguity stems from the capitalization of the term "named insured" on the declarations page. According to Johnson, he was a

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[19] Berg v. Hudesman, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (allowing the use of extrinsic evidence whether or not the contract language is ambiguous).

[20] Hall, 133 Wn. App. at 399 ("[T]he insured's expectations do not override the contract's plain language.").

[21] See 9 J. Wigmore, Evidence § 2466, at 229 (Chadbourn rev. 1981). See also Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999) (stating that admissible extrinsic evidence does not include evidence of unilateral intent, intention independent of the instrument, or evidence that would tend to contradict or modify the written terms).

"name insured" for purposes of the definition of "you" but not the "Named Insured" on the insurance policy. This argument is frivolous. Though an insured is entitled to favorable construction of ambiguous terms, the court will not adopt a "'strained or forced construction' leading to absurd results."[22] Here, the only place that "named insured" appeared in the declarations was in the heading section, where nearly every heading and subheading was capitalized. As Holthe indicates, to learn who the "named insured" is, one need only look to the name appearing under this heading. In the context of this policy capitalization has no effect on the meaning of the term.

Johnson's final argument with regard to "named insured" invokes the rule that exclusionary or limiting clauses are to be construed in favor of the insured and against the insurer. This rule provides no assistance to Johnson. While "exclusionary clauses are to be construed strictly against the insurer,"[23] whether Johnson qualifies as a "named insured" is a matter of inclusion, not exclusion. Johnson must therefore show as part of his prima facie case that his loss was within the scope of losses covered by the insurance policy.[24] Absent such a showing, this interpretive rule is of no moment. Because Johnson was not a

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[22] Eurick v. Pemco Ins. Co., 108 Wn.2d 338, 341, 738 P.2d 251 (1987) (quoting E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co., 106 Wn.2d 901, 907, 726 P.2d 439 (1986)).

[23] Mid-Century Ins. Co. v. Henault, 128 Wn.2d 207, 213, 905 P.2d 379 (1995).

[24] See, e.g., Farmers Ins. Co. v. Miller, 87 Wn.2d 70, 76, 549 P.2d 9 (1976) (similarly noting the difference between initial extension of coverage and interpretation of exclusionary clauses).

"named insured" according to the plain terms of the policy, he failed to establish the threshold requirement that his loss was covered by the insurance policy.

*RCW 48.22.030*

Johnson claims that MetLife denied him UIM coverage in violation of the UIM statute, RCW 48.22.030.[25] According to Johnson's reading, the clause in subsection (2), "for the protection of persons insured thereunder," encompasses those persons named in the insurance policy. And since subsection (3) mandates that "coverage . . . under subsection (2) . . . shall be in the same amount as the insured's third party liability coverage," he alleges that he was entitled to full liability and UIM benefits. He complains that under MetLife's reasoning, anyone driving a covered auto would receive UIM coverage regardless of whether they were named on the policy. Thus, he had "no more UIM coverage than their next door neighbor. . . . [which means] he ha[d] no UIM coverage at all."

This argument is flawed for two reasons. First, as mentioned above,

[25] RCW 48.22.030 reads in relevant part:

> (2) No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury . . . suffered by any person arising out of the . . . use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provide therein . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles . . . .
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> (3) . . . coverage required under subsection (2) of this section shall be in the same amount as the insured's third party liability coverage unless the insured rejects all or part of the coverage as provided in subsection (4) of this section.

insurance policies are contracts,[26] and where the policy language is plain, ordinary, and clear, as it is here, the language is enforced as written. Johnson had some UIM coverage, just not while driving a rental car. Whether this is more or less coverage than what a neighbor may have had has no bearing on this case.

Second, the rule flowing from the case law interpreting RCW 48.22.030 is that UIM coverage must, at a minimum, be coextensive with third party liability coverage.[27] This does not mean, however, that providing different coverage for "named insureds" and other insureds within the same contract is prohibited.[28]

Justice Neill wrote in his concurrence to Touchette v. Northwestern Mutual Insurance Co. that

> the statutory policy [does not] prohibit[] the parties from agreeing to narrower definitions of "insured" . . . . RCW 48.22.030 provides for uninsured motorist vehicle coverage in automobile liability insurance contracts "for the protection of persons insured thereunder." The statute nowhere mandates a particular definition of "persons insured" and the extent of that definition is thus left to voluntary agreement. In that respect, neither the terms nor the intent of the statute alters our general rule that parties are free to contract for any risk they choose, adjusting the premium to the risks assumed, and that courts may not modify or revise the intent

[26] RCW 48.01.040 states, "Insurance is a contract."

[27] See, e.g., Cochran v. Great W. Cas. Co., 116 Wn. App. 636, 641, 67 P.3d 1123 (2003) (noting that in Washington, UIM coverage limits must equal third party liability coverage limits) (citing RCW 48.22.030); Jochim v. State Farm Mut. Auto. Ins. Co., 90 Wn. App. 408, 414, 952 P.2d 630 (1998) ("RCW 48.22.030 requires insurers to offer UIM coverage to the same extent as the insured's third party liability coverage.").

[28] See Blackburn v. Safeco Ins. Co., 115 Wn.2d 82, 89, 794 P.2d 1259 (1990).

> of the parties under the guise of contract construction.[29]

Justice Neill's reasoning was adopted by the court four years later when it held that RCW 48.22.030 "does not mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy."[30] Our Supreme Court reaffirmed this position as recently as 2004:

> The statutory policy of Washington's UIM statute "vitiates any attempt to make the meaning of insured for purposes of uninsured motorist coverage narrower than the meaning of that term under the primary liability section of the policy."[31]

Thus, an insurance policy may provide broader coverage for named insureds and their family members than it does for other insureds so long as the definition of "insured" under the UIM coverage is at least as broad as the definition under the policy's liability coverage.

The application of the rule to this case is straightforward. The liability section of Collins's policy defined "insured" as:

1. with respect to a covered automobile:
    a. you;
    b. any relative; or
    c. any other person using it within the scope of your permission

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[29] 80 Wn.2d 327, 336, 494 P.2d 479 (1972).

[30] Miller, 87 Wn.2d at 75.

[31] Butzberger v. Foster, 151 Wn.2d 396, 401-02, 89 P.3d 689 (2004) (internal quotation marks omitted) (quoting Rau v. Liberty Mut. Ins. Co., 21 Wn. App. 326, 328-29, 585 P.2d 157 (1978)).

2. with respect to a non-owned automobile, you or any relative.

Johnson did not meet the definition of "you." Thus, Johnson had liability coverage while operating covered vehicles but not while operating a rental car. The policy provided him with UIM coverage in all instances in which it provided him with liability coverage. This is all the statute requires. Accordingly, the insurance contract satisfied RCW 48.22.030 and its underlying public policy.[32]

*RCW 48.30.300*

Johnson asserts that MetLife's UIM policy unlawfully discriminates on the basis of marital status in violation of RCW 48.30.300.[33] This argument fails as well. He relies exclusively upon Edwards v. Farmers Insurance Co.[34] In that case, the insurance policy read:

> If any applicable insurance other than this policy is issued to [the named insured, or the named insured's spouse if residing in the same household] by us . . . , the total amount payable among all such policies shall not exceed the limits provided by the single policy with the highest limits of liability.[35]

The court held that this provision violated RCW 48.30.300 because it limited

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[32] Johnson also points to his PIP payment, arguing that because the PIP and UIM provisions use the same definition of "you," it would be inconsistent to pay the PIP claim but deny the UIM claim. MetLife counters that it mistakenly paid the PIP claim. But because MetLife is not seeking reimbursement, we need not decide this issue.

[33] This statute provides that an "entity engaged in the business of insurance may not refuse to issue any contract of insurance . . . because of . . . marital status." Further, "[t]he amount of benefits payable, or any term, rate, condition, or type of coverage may not be restricted . . . on the basis of . . . marital status."

[34] 111 Wn.2d 710, 763 P.2d 1226 (1988).

[35] Edwards, 111 Wn.2d at 716 (alterations in original).

recovery for the estate of a husband and wife that would not have been restricted but for their marriage.

To explain its holding, the court compared this provision to one it upheld against an RCW 48.30.300 challenge four years earlier in State Farm General Insurance Co. v. Emerson.[36] The policy at issue in that case excluded recovery for bodily injury to any "insured," defined as, "(1) The Named Insured stated in the Declarations of this policy; (2) if residents of the Named Insured's household, his spouse, the relatives of either, and any other person under the age of twenty-one in the care of any Insured."[37] According to Edwards, the difference between the two provisions was that despite the presence of the term "spouse" in both policies, the Emerson clause was not a marital exclusion but an exclusion of all family members.[38] "Thus, even though a distinction along family lines also serves to classify married couples differently than unmarried couples, . . . there was no discrimination on the basis of marital status."[39] By contrast, the clause at issue in Edwards turned exclusively on marital status.

MetLife's policy is almost identical to the one in Emerson. It provided UIM coverage for those qualifying as "you" or a "relative." "Relative" included any other person tied to "you" by blood, marriage, or adoption, and who resided in the same household. Because this distinction follows family lines, MetLife's

[36] 102 Wn.2d 477, 687 P.2d 1139 (1984).
[37] Emerson, 102 Wn.2d at 479, n.1.
[38] Edwards, 111 Wn.2d at 719.
[39] Edwards, 111 Wn.2d at 719.

definition is lawful despite any differential impact between married and unmarried couples.

*Request for Attorney Fees*

Johnson requests attorney fees under Olympic Steamship Co. v. Centennial Insurance Co.[40] Olympic Steamship only authorizes an award of attorney fees if an insured prevails.[41] Because Johnson has not prevailed, he is not entitled to Olympic Steamship fees and costs.

CONCLUSION

Johnson was not a "named insured" by virtue of being listed on Collins's policy as a "household driver" or otherwise. Further, MetLife's policy satisfied the requirements of both RCW 48.22.030 and RCW 48.30.300. Accordingly, we affirm the trial court.

WE CONCUR:

Leach, J.

Appelwick, J.

Cox, J.

[40] 117 Wn.2d 37, 811 P.2d 673 (1991).
[41] Olympic Steamship, 117 Wn.2d at 53.